

Ky. Op. Atty. Gen. 11-ORD-143, 2011 WL 4478424 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

11-ORD-143

September 14, 2011

In re: R. Roland Case/Utility Management Group, LLC

Summary: The Attorney General finds that Utility Management Group, LLC is a “public agency” within the meaning of [KRS 61.870\(1\)\(h\)](#), because it derives at least 25 percent of the funds it expends in Kentucky from local authorities, and thus violated the Open Records Act in denying a request for non-exempt financial records.

Open Records Decision

At issue in this appeal is whether Utility Management Group, LLC (“UMG”) violated the Kentucky Open Records Act by denying Assistant Pike County Attorney R. Roland Case's March 4, 2011 request on behalf of the Pike County Fiscal Court, for “copies of their checks and expenses since the original contract [r]act between [the Mountain Water District] and UMG.” Case requested “a list of expenditures including check number, date, amount and payee for all checks written from January 7, 2005 to the present.” [\[FN1\]](#) UMG, through counsel, replied that it was not subject to the Open Records Act, and declined to provide any information. UMG asserted that it “is a wholly private entity. . .” and “...has consistently taken this position with other public agencies and/or bodies which have sought records or information from UMG pursuant to the Open Records Act.” Mr. Case subsequently initiated this appeal, arguing that UMG is a “public agency” under [KRS 61.870\(1\)\(h\)](#). This office requested additional information from UMG under authority of [KRS 61.880\(2\)\(c\)](#) and [40 KAR 1:030](#), Section 3, to assist in resolution of the threshold question of whether UMG is a “public agency” within the meaning of [KRS 61.870\(1\)\(h\)](#). UMG refused to provide the information requested. Subsequent to that refusal, this office independently obtained public information that confirms UMG is a “public agency” within the meaning of [KRS 61.870\(1\)\(h\)](#). We find that UMG violated the Act in declining to comply with Mr. Case's request.

The core inquiry of this appeal is whether UMG is a “public agency” for purposes of the Open Records Act. UMG denies that it is a public agency but does not assert that any of the information requested would be subject to any exemption made available in the provisions of the Act. Pursuant to [KRS 61.880\(c\)](#), “...The burden of proof in sustaining the action shall rest with the agency, and the Attorney General may request additional documentation from the agency for substantiation.”

[KRS 61.870\(1\)](#) [\[FN2\]](#) broadly defines a “public agency” at subsections (a)-(k). [KRS 61.870\(1\)\(h\)](#) is the only subsection that could be applicable to UMG on the facts presented. Under [KRS 61.870\(1\)\(h\)](#) a private corporation, whether non-profit or for-profit, is not a public agency for purposes of the Open Records Act *unless* it “derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” See [KRS 61.870\(1\)](#) as construed in 92-ORD-1114; 94-ORD-98; 97-ORD-114; 99-ORD-65; 05-ORD-012; 06-ORD-162; 09-ORD-033; 09-ORD-042; 09-ORD-083; 11-ORD-021;

11-ORD-040. Any interpretation of [KRS 61.870](#) must be made with full consideration of the legislative intent that free and open examination of public records is in the public interest and that the Act should be strictly construed in favor of inclusion rather than exclusion from its provisions. [\[FN3\]](#)

***2** In an attempt to obtain all information relevant to a correct resolution of this appeal, the Office of the Attorney General (“OAG”) requested additional information from UMG pursuant to [KRS 61.880\(2\)\(c\)](#) and [40 KAR 1:030](#), Section 3. Specifically, OAG requested for UMG to clarify whether it receives any funds directly from the Mountain Water District or the City of Pikeville by virtue of contractual agreements with those public agencies. This office also requested that UMG provide a copy of any financial documentation from the most recent fiscal year that would enable us to conclusively determine whether UMG receives *any* funds, whether from the General Fund or otherwise, from state or local authorities and *if* so, what percentage is expended in the Commonwealth of Kentucky. Finally, this office asked UMG to explain the process by which UMG receives consumer fees and the nature of those fees.

In a timely response, UMG reiterated the argument that it is not a state agency and [KRS 61.880\(2\)\(c\)](#) and [40 KAR 1:030](#), Section 3 “are not applicable to UMG.” Notwithstanding that position, UMG did provide some additional information including the acknowledgement that the City of Pikeville and the Mountain Water District (“MWD”) pay UMG a set amount per month for services provided to those entities. UMG denied that state and federal funds appropriated for capital improvements related to those entities were used to pay UMG and insisted those funds are accounted for by the City and/or MWD completely separate from consumer fees collected from customers.

Given the unwillingness of UMG to provide additional information, this office conducted additional research in the matter and ultimately obtained public information demonstrating that UMG is a public agency pursuant to [KRS 61.870\(1\)\(h\)](#). Records of the Kentucky Secretary of State confirm that UMG is a Kentucky for-profit limited liability company organized in August of 2004. OAG also obtained copies of the various contracts that UMG entered into with the City of Pikeville and MWD. Additionally, OAG reviewed the findings of the Auditor of Public Accounts as contained in her “Examination of Certain Policies, Procedures, Controls, and Financial Activity of Mountain Water District” issued on January 27, 2011. [\[FN4\]](#)

A review of the contracts at issue reveals that the City of Pikeville and MWD have entered into successive contractual agreements with UMG to operate, maintain, and manage the operations of the public waterworks of MWD and the City of Pikeville. Under the terms of the contracts, the City of Pikeville and MWD receive payments from the utility customers, and pay UMG a fee for services provided. The most recent of these agreements calls for UMG to receive \$7.6 million annually from MWD and in excess of \$4 million annually from the City of Pikeville for services provided.

The determining factor in this decision is that UMG has only two known sources of revenue—contracts with MWD and the City, both of which are indisputably public agencies within the meaning of [KRS 61.870\(1\)](#), and which are statutorily authorized [\[FN5\]](#) to collect fees paid by consumers for the services provided. Upon receipt by each public agency, regardless of the source or purpose for which such funds are paid, those funds take on a public character and can be properly characterized as “state or local authority funds,” a phrase which is comprehensive and includes fee revenues generated by MWD and the City. UMG is then compensated with public funds for performing certain services through, or on behalf of, MWD and the City. The fact is that the City and MWD simply pay UMG a set amount of public funds per month for the services provided by UMG to these public agencies.

***3** All the documentation obtained and reviewed by OAG fully supports the conclusion that UMG receives substantial revenues from its contracts with MWD and the City of Pikeville, and derives at least 25 percent of the funds it expends in Kentucky from these two local authorities. UMG has declined to provide this office with any documentation, and OAG has no information that would indicate that UMG expends *any* amount in the Commonwealth that is not derived from one of these two authorities. Because UMG is a “public agency” within the meaning of [KRS 61.870\(1\)\(h\)](#), and pursuant to [KRS 61.880\(2\)\(c\)](#) “[t]he burden of proof in sustaining the action shall rest with the agency . . . ” UMG’s bare assertion that it is a “private entity” is not sufficient to contradict the facts reviewed. UMG refused to provide any documentation to validate that it is not “otherwise” a “public agency.” Although UMG was afforded multiple opportunities to substantiate its position, it adamantly declined to do so.

UMG must provide Mr. Case with copies of any existing records in its custody which are responsive to his request unless it can satisfy its burden of proof by articulating, in writing, a statutory basis for denying access in terms of one or more of the exceptions codified at [KRS 61.878\(1\)\(a\)-\(n\)](#). As explained below, in the alternative UMG may appeal this decision to circuit court.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Jack Conway
Attorney General

Patrick Hughes
Deputy Attorney General

[\[FN1\]](#). This office has long recognized that a public agency is not statutorily required to create a record or compile a list in order to comply with a request under the Act; however, in lieu of doing so a public agency must provide the requester with an opportunity to inspect existing non-exempt records which may contain the information being sought. See 09-ORD-145, pp. 8-9.

[\[FN2\]](#). [KRS 61.870\(1\)](#) defines “public agency” to include:

- (a) Every state or local government officer;
- (b) Every state or local government department, division, bureau, board, commission, and authority;
- (c) Every state or local legislative board, commission, committee, and officer;
- (d) Every county and city governing body, council, school district board, special district board, and municipal corporation;
- (e) Every state or local court or judicial agency;
- (f) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (g) Any body created by state or local authority in any branch of government;
- (h) Any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds;
- (i) Any entity where the majority of its governing body is appointed by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (j), or (k), of this subsection; by a member or employee of such a

public agency; or by any combination thereof;

(j) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff, established, created, and controlled by a public agency as defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (k) of this subsection; and

(k) Any interagency body of two (2) or more public agencies where each public agency is defined in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) of this subsection[.]

[FN3]. KRS 61.871 provides, “The General Assembly finds and declares that the basic policy of KRS 61.870 to 61.884 is that free and open examination of public records is in the public interest and the exceptions provided for by KRS 61.878 or otherwise provided by law shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.

[FN4]. The Audit Report can be accessed on the Auditor of Public Accounts' website at: [http://www.auditor.ky.gov/Public/Audit Reports/Archive/2011MountainWaterDistrict.pdf](http://www.auditor.ky.gov/Public/Audit%20Reports/Archive/2011MountainWaterDistrict.pdf). Like OAG, the Auditor of Public Accounts concluded that UMG is a “public agency” pursuant to KRS 61.870(1)(k).

[FN5]. See KRS Chapters 74 and 278 regarding the rights and responsibilities of MWD and KRS Chapter 96 for those of the City.

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